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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

HOWARD ROSS, Plaintiff and Appellant, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant and Respondent.	B172989 (Los Angeles County Super. Ct. No. BC295618)

APPEAL from a judgment of the Superior Court of Los Angeles County. Elizabeth A. Grimes, Judge. Affirmed.

John A. Belcher for Plaintiff and Appellant.

Law Offices of Robert A. Walker, Robert A. Walker and Brian Andenoro for Defendant and Respondent.

Dr. Howard Ross, a psychiatrist and an insured, contends that because he was insane, his insurer must defend him in a third-party lawsuit based on allegations that he sexually harassed a coworker. In this declaratory relief action, the trial court correctly found no potential for coverage under the terms of Ross's insurance policies. We shall affirm the summary judgment in favor of the insurer.

FACTUAL BACKGROUND

Foley Sues Ross

On February 13, 2002, Kimberly Foley, an employee of the Riverside County Department of Mental Heath, filed a complaint naming Ross as one of the defendants.[1] She subsequently amended the complaint, alleging causes of action for illegal employment discrimination, intentional infliction of emotional distress, and violation of civil rights. All three causes of action were based on substantially the same underlying factual allegations.

Foley's factual allegations include the following. Ross sexually harassed her from July 1998 through February 2001. He proposed after work liaisons, trips together, and hugged her during work. He also indicated that he wished to consummate a sexual relationship with her. Ross left a suicide note stating he had to kill her or sexually attack her. Despite Foley's restraining order, Ross continued to contact her, and from 1998 he threatened her and gave her "unwanted attention." Ross "declared his desire to establish a sexual relationship with her, attempted to embrace her in her office, and repeatedly made his love for her the subject of unwanted attentions."

Ross tendered the defense to the United Services Automobile Association (USAA), which had issued him a Homeowners Insurance Policy and a Personal Umbrella Policy.[2]

Ross's Homeowner's Policy

The homeowner's policy insured Ross for each "occurrence," which was defined as "an accident, including continuous or repeated exposure to substantially the same

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[1] Foley also sued the County of Riverside and a management employee. The allegations against them principally concerned their failure to respond to her numerous complaints regarding Ross's conduct.

[2] The policies were annually renewed, but the parties point to no relevant modifications from year to year. Therefore we need not refer separately to each annual policy.

general harmful conditions, which results, during the policy period in: [¶] a. bodily injury; or [¶] b. property damage." The homeowner's policy defined "bodily injury" as "bodily harm, sickness or disease, including required care, loss of services and death that results." The policy excluded "[i]ntentional [l]oss, meaning any loss arising out of any act committed: [¶] (1) by or at the direction of any insured; and [¶] (2) with the intent to cause a loss." It also excluded "bodily injury or property damage: a. caused by the intentional or purposeful acts of any insured, including conduct that would reasonably be expected to result in bodily injury to any person or property damage to any property. [¶] b. (1) arising out of or in connection with a business engaged in by an insured."

Ross's Umbrella Policy

The umbrella policy provided, "We [USAA] will pay for damages an insured becomes legally obligated to pay in excess of the retained limit. This obligation must arise from an occurrence not excluded by this policy. We will not pay for punitive or exemplary damages, fines or penalties." The umbrella policy provides two definitions of "occurrence: "[a]n accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in bodily injury or property damage" or "[a]n event or series of events, including injurious exposure to conditions, proximately caused by an act or omission of any insured, which results during the policy period, in personal injury, neither expected nor intended from the standpoint of the insured. The liability "must arise from an occurrence not excluded by this policy." Personal injury is defined as "injury other than bodily injury arising out of [¶] a. Libel, slander, defamation of character, humiliation, malicious prosecution, invasion of rights of privacy. [¶] b. False arrest, false imprisonment, wrongful detention. [¶] c. wrongful eviction, wrongful entry. [¶] d. Assault and battery if committed by any insured or at his direction to protect persons or property. This applies only when the conduct is not criminal."

The umbrella policy excluded bodily injury "caused by the intentional or purposeful acts of any insured, including conduct that would reasonably be expected to result in bodily injury to any person or property damage to any property." It also

excluded liability "arising out of any actual, alleged or threatened: [¶] (a) sexual misconduct; [¶] (b) sexual harassment; [¶] (c) sexual molestation; or [¶] (d) physical or mental abuse."

USAA Refuses To Defend Ross

USAA refused to defend Ross, informing him that there was no potential for coverage. Ross requested that USAA reconsider its decision and sent USAA a report of a psychiatric examination conducted by Dr. David Schneffer. Schneffer concluded, that beginning in 1998, Ross developed a major depression, which included suicidal behavior. Ross's symptoms also included "distorted ideation regarding a perceived romanticized (i.e. at least, quasi-delusional) relationship with a female co-worker, poor judgment (e.g. not seeking treatment with a psychiatrist), impulsivity, labality of mood (with concomitant highly inappropriate/ unrealistic behavior), other bizarre behavior (e.g. injecting himself with bacteria in October 1998), [and] . . . an apparent history of auditory hallucinations . . . ." Schneffer also reported that Ross manifested "psychotic features, i.e. , gross impairments in reality-testing/judgment . . . ."

Notwithstanding Schneffer's report, USAA refused to defend or indemnify Ross.

PROCEDURAL BACKGROUND

Ross filed a complaint seeking declaratory relief and alleging causes of action for breach of contract and breach of the implied covenant of good faith and fair dealing.

USAA moved for summary judgment. It argued there was no "occurrence" as defined by the homeowner's policy and umbrella policy. USAA also argued that the conduct Foley alleged fell within exclusions in each policy. In opposition to USAA's motion for summary judgment, Foley argued that whether Ross's conduct was intentional depends on his sanity; there was no evidence Ross intended to injure Foley; not all of the conduct fell within the employment exclusion and not all of the alleged conduct constituted sexual misconduct.

The trial court granted the motion for summary judgment. The court found that the definition of occurrence in Ross's homeowner and umbrella policies barred coverage. The trial court also concluded that Insurance Code section 533 bars coverage for willful

acts unless a plaintiff (seeking coverage) is insane. The court found no evidence Ross was legally insane despite the evidence that he suffered from major depression. This appeal followed.

DISCUSSION

In his opening brief Ross argues "A. Intent is a triable issue. B. The possibility of unintentional conduct triggers a defense. C. The trial court violated the golden rule of summary judgment [when it considered Ross's intent]. D. Application of the Intentional act exclusion depends on resolution of the issue of Dr. Ross's sanity." These arguments primarily focus on Insurance Code section 533, which provides "An insurer is not liable for a loss caused by the willful act of the insured . . . ." The "willful" component of this provision may be absent where the insured lacks the "cognitive capacity to understand the nature, consequences and wrongfulness of his conduct . . . ." (*Jacobs v. Fire Insurance Exchange* (1995) 36 Cal.App.4th 1258, 1261.) Ross's arguments are also relevant to the "intentional act" exclusion in both the homeowner's and umbrella policies. A "mistaken belief in the right to engage in the conduct . . . [may] negat[e] any intent to sexually harass or discriminate against the victim." (*Kleis, Inc. v. Superior Court* (1995) 37 Cal.App.4th 1035, 1050.)

None of these arguments, however, considers the more fundamental issue: whether either the homeowner's policy or umbrella policy potentially covers the conduct alleged in Foley's lawsuit. "The policyholder bears the initial burden of proving the potential for coverage" and an insurer must defend against a complaint that potentially falls within the scope of coverage. (*Modern Development Co. v. Navigators Ins. Co.* (2003) 111 Cal.App.4th 932, 941- 942.) The insurer bears the burden of demonstrating that an exclusion in an insurance policy is applicable. (*MacKinnon v. Truck Ins. Exchange* (2003) 31 Cal.4th 635, 648.)

The trial court expressly found that the conduct alleged in Foley's complaint does not fall within the definition of "occurrence" in the policies. Therefore, coverage, not intent, is the threshold question. (See *Gray v. Zurich Insurance Co.* (1966) 65 Cal.2d

263.) We review the trial court's decision de novo. (*Mackinnon v. Truck Ins. Exchange, supra*, 31 Cal.4th at p. 641.)

To determine if there is a potential for coverage, we must consider the terms of the insurance policy and the allegations in the third-party complaint "recognizing that the third party plaintiff cannot be the arbitrator of coverage." (*Modern Development Co. v. Navigators Insurance Co., supra,* 111 Cal.App.4th at p. 939.) The interpretation of an insurance contract is a question of law. (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) We consider Ross's homeowner's policy and umbrella policy separately.

1. *Homeowner's Policy*

In Ross's homeowner's policy, "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period in: a. bodily injury; or b. property damage."

In his reply brief, Ross argues that the claimed injures were accidents because they were "unexpected, unintentional, and unforeseen." He further argues the acts were unintentional because he "believed he was in a 'mutual,' 'romantic' relationship. [Citation]. To Dr. Ross, in his 'delusional' mental state, it was unexpected and unforeseen that Ms. Foley would claim injury by Dr. Ross' asking for hugs and giving birthday presents."

Ross's argument is not consistent with the meaning of the term "accident." "'Accident': Unless the term 'accident' is otherwise defined in the policy, it is given a commonsense interpretation: i.e., an 'unintentional, unexpected, chance occurrence.'" (*Modern Development Co. v. Navigators Ins. Co., supra,* 111 Cal.App.4th at p. 940, fn.4, quoting *St. Paul Fire & Marine Ins. Co. v. Sup.Ct. (County of Yuba)* (1984) 161 Cal.App.3d 1199, 1202.) Where an accidental occurrence is a condition of coverage, the insured has the burden of demonstrating that the occurrence was accidental. (*Id.* at p. 942.) For purposes of summary judgment, Ross raises a triable issue of material fact with respect to whether he was operating under a mistake of fact – the incorrect view that his romantic interest was welcomed by Foley, a view that he attributes to the delusional nature of his depression. Schneffer's report supports Ross's statement. Whether Foley

welcomed Ross's advances may be relevant to the claim of sexual harassment; "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" (*Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 68.) However, even assuming that Ross's advances were welcome, that does not show they were accidental, i.e. a chance occurrence.

Ross appears to assume that his conduct falls within the definition of the term "accident" because he did not harbor the specific intent to injure. He cites evidence that an attorney for USAA, in her deposition indicated that USAA did not reach the conclusion that Ross had the specific intent to injure. Under California law, the term accident refers to the insured's act, not his state of mind in performing the act. (*Quan v. Truck Ins. Exchange* (1998) 67 Cal.App.4th 583, 599 [no coverage when "acts asserted to give rise to the underlying claimant's injuries were deliberate, regardless of whether any harm was intended or expected to come of them"]; see also Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2004) ¶ 7:45, p. 7A-14.)

Finally, Ross correctly points out that intentional conduct may result in unforeseen consequences. (See e.g. *State Farm Fire & Casualty Co. v. Eddy* (1990) 218 Cal.App.3d 958 [holding that an insurer was required to defend a lawsuit alleging the improper transmission of a sexually transmitted disease even though the court found that the sexual conduct was voluntary].) However, none of the cases he relies on for that principle consider the meaning of "accident" as that term is used in an insurance policy and are therefore not helpful in answering the threshold question in this case.

2. Umbrella Policy

One definition of "occurrence" in the umbrella policy is the same as the definition of "occurrence" in the homeowner's policy. For the reasons discussed above, the conduct alleged in Foley's pleading does not fall within that definition of "occurrence." In short, Ross does not demonstrate any "accident."

The umbrella policy contains a second definition of "occurrence": [a]n event or series of events, including injurious exposure to conditions, proximately caused by an act or omission of any insured, which results, during the policy period, in personal injury,

neither expected nor intended from the standpoint of the insured." "Personal injury" is defined as injury arising out of "libel, slander, defamation of character, humiliation, malicious prosecution, invasion of rights of privacy . . . false arrest, false imprisonment, wrongful detention . . . wrongful eviction, wrongful entry," and assault and battery under specified circumstances.

In his separate statement, Ross included the following fact: "As a result of the foregoing conduct of defendants, the plaintiff has suffered great distress of body and mind and great humiliation in consequence of such outrageous, unlawful, unjust and wrongful acts, and she has suffered damages in an amount according to proof." Ross's implicit argument that the allegations of the complaint fall within the definition of occurrence in the umbrella policy is sound. "[T]he word 'event' is not limited to fortuitous happenings." (*United Pacific Ins. Co. v. McGuire Co.* (1991) 229 Cal.App.3d 1560, 1565.) The allegations include humiliation and logically fall within the definition of humiliation as an attorney for USAA acknowledged in her deposition.

However, "[a]n insurance policy may exclude coverage for particular injuries in certain specified circumstances while providing coverage in other circumstances." (*Frank and Freedus v. Allstate Insurance Co.* (1996) 45 Cal.App.4th 461, 471.) For coverage under the umbrella policy the liability "must arise from an occurrence not excluded by this policy." USAA argues that it falls within the exclusion for sexual harassment, sexual misconduct, and physical or mental threats. The exclusion plainly excludes liability "arising out of any actual, alleged or threatened: [¶] (a) sexual misconduct; [¶] (b) sexual harassment; [¶] (c) sexual molestation; or [¶] (d) physical or mental abuse."

Ross appears to argue that this exclusion does not apply for two reasons: (1) Ross did not believe his actions constituted sexual harassment and (2) the allegations include "unwanted 'contacts,'" which do not rise to the level of "sexual misconduct." As we shall explain, neither argument has merit.

First, Ross states, "[a]t a minimum, Dr. Ross was clearly mistaken about his relationship with Ms. Foley. Because of his mental illness, Dr. Ross did not believe his

actions to be sexual harassment. He believed his interactions with Ms. Foley were 'romantic.'" Ross appears to be arguing that an express exclusion is applicable only where the insured did not intend the harm described in the exclusion. The appropriate inquiry, however, is "whether *the underlying action for which defense and indemnity is sought* potentially seeks relief within the coverage of the policy," not whether the insured believes he or she is liable for the alleged misconduct. (*La Jolla Beach & Tennis Club, Inc. v. Industrial Indemnity Co.* (1994) 9 Cal.4th 27, 44.) An insurer is not required to defend a claim that is outside the scope of the insuring clause or within the ambit of an express exclusion. (*California Ins. Guarantee Assn. v. Wood* (1990) 217 Cal.App.3d 944, 948.) Therefore, assuming that Ross believed he was in a mutual relationship, there still is no potential for coverage of alleged sexual harassment, sexual misconduct, or physical or mental threats.

Second, in his opposition to USAA's motion for summary judgment, Ross stated "not all of Ms. Foley's allegations involve sexual misconduct. Ms. Foley complained of unwanted 'contacts.' . . . These contacts included non-sexual activities such as giving her a birthday gift and sending her letters." Ross makes a similar argument in his reply brief, citing *Horace Mann Ins. Co. v. Barbara B.* (1993) 4 Cal.4th 1076, 1082, which holds that a person liable for sexual misconduct may also "be liable for torts of negligence against the victim which are apart from, and not integral to, the molestation."

In contrast to *Barbara B.*, Ross identifies no conduct outside the exclusion for sexual harassment, sexual misconduct, and physical or mental threats. While he states that not all of the conduct amounts to "sexual misconduct," that ignores the other components in the policy exclusion. While some alleged conduct was more egregious than other conduct, it is all integral to the harassment claim. Foley's operative complaint is that Ross sexually harassed her and thereby violated her civil rights and intentionally inflicted emotional distress and caused her harassment.

Ross does not identify any allegations in Foley's complaint that potentially fall within the definition of occurrence but outside the exclusion for sexual misconduct, sexual harassment, and physical or mental threats. He provides no reasonable

interpretation of this exclusionary language that would not encompass all of the conduct in Foley's complaint. (See *MacKinnon v. Truck Insurance Exchange, supra,* 31 Cal.4th at p. 649.) He therefore raises no triable issue of material fact with respect to the potentiality for coverage under the umbrella policy.

Because there was no potentiality for coverage, USAA did not incur the duty to defend him in Foley's lawsuit. (See *Gray v. Zurich Ins. Co., supra,* 65 Cal.2d 263 at p. 275 [an insurer must defend an action in which the third party complaint "*potentially* seeks damages within the coverage of the policy. . . ."].) "It is clear that if there is no *potential* for coverage and, hence, no duty to defend under the terms of the policy, there can be no action for breach of the implied covenant of good faith and fair dealing because the covenant is based on the contractual relationship between the insured and the insurer." (*Waller v. Truck Ins. Exchange, Inc., supra,* 11 Cal.4th at p. 36.) The trial court correctly granted summary judgment in favor of USAA.

DISPOSITION

The judgment is affirmed. Each party to bear his or its own costs on appeal.

COOPER, P.J.

We concur:

RUBIN, J.

FLIER, J.